IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Michael J. Talbot, Presiding Judge

KENNETH KARACZEWSKI
Plaintiff-Appellee,

v

Docket no. 129825

FARBMAN STEIN & COMPANY
NATIONWIDE MUTUAL INSURANCE COMPANY
Defendants-Appellants.
_____/

BRIEF ON APPEAL - APPELLANTS

ORAL ARGUMENT REQUESTED

Martin L. Critchell (P26310)
Counsel for defendants-appellants
30700 Telegraph Road, Suite 2580
Bingham Farms, Michigan 48025
(248) 593-2450

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

CASES

FEDERAL

STATE

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

MCR 7.301(A)(2) and the second sentence of MCL 418.861a(14) give the Court authority to review *Karaczewski v Farbman Stein & Co*, unpublished opinion of the Court of Appeals, decided on October 18, 2005 (Docket no. 256172).

The application for leave to appeal and filing fee were filed with the Court on (Friday) November 4, 2005.

STATEMENT OF QUESTION PRESENTED

I

DOES THE BOARD OF MAGISTRATES HAVE SUBJECT MATTER JURISDICTION BECAUSE THE EMPLOYEE WAS NOT A RESIDENT OF MICHIGAN WHEN INJURED IN FLORIDA?

Plaintiff-appellee Karaczewski answers "Yes."

Defendants-appellants Farbman - Nationwide answer "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "Yes."

STATEMENT OF FACTS

Kenneth Karaczewski was injured while working for Farbman Stein & Company in Florida where he was living with his wife and daughter. (11a)

Karaczewski then filed an application for mediation or hearing with the Michigan Bureau of Workers' and Unemployment Compensation claiming compensation from Farbman by the terms of the Michigan Workers' Disability Compensation Act of 1969, MCL 418.101, et seq. (1a, 3a) Farbman appeared and contested this. (4a)

After mediation, the case was remitted for a hearing and disposition by the Board of Magistrates.

The Board continued jurisdiction to hear the claim after recognizing the facts that Karaczewski and Farbman had agreed upon and considering briefs which were filed on the question about subject matter jurisdiction. *Karaczewski v Farbman Stein & Co*, unpublished order and opinion of the Board of Magistrates, decided on November 4, 2002 (Docket no. 110402077). (12a)

The Workers' Compensation Appellate Commission affirmed. *Karaczewski v Farbman Stein & Co*, 2004 Mich ACO #133. (13a, 19a)

The Court of Appeals granted leave to appeal only to consider the question of the subject matter jurisdiction, *Karaczewski v Farbman Stein & Co*, unpublished order of the Court of Appeals, decided on November 4, 2004 (Docket no. 256172) (21a), and affirmed. *Karaczewski v Farbman Stein & Co*, unpublished opinion of the Court of Appeals, decided on October 18, 2005 (Docket no. 256172). (25a-26a)

The Court granted leave to appeal and directed briefing "whether appellants' proposed overruling of *Boyd v W C Wade Shows*, 443 Mich 515 (1993) is justified under the standard for applying stare decisis discussed in *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000)." *Karaczewski v Farbman Stein & Co*, 475 Mich - ; - NW2d - (2006). (27a)

SUMMARY OF ARGUMENT

The standard for affirming or overruling an opinion of the Court about the meaning of a statute is the fidelity to the particular text of that law. Reliance on an opinion and the consequences to people and to courts are considerations only after overruling an opinion and then, to decide how to apply the current understanding of prior text.

ARGUMENT

I

THE BOARD OF MAGISTRATES DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE THE EMPLOYEE WAS NOT A RESIDENT OF MICHIGAN WHEN INJURED IN FLORIDA.

And is commonly and properly used as an associative conjunction that connects the words, clauses, or sentences that are to be understood jointly. *The Oxford American College Dictionary* 43 (GP Putnam's Sons 2003). *Webster's New Collegiate Dictionary* 43 (G & C Merriam Co 2004). People use **and** as an associative conjunction whether in a declarative sentence such as **I have a wife and child** or a question such as **Did you wash and wax the floors?** Even children understand this use of **and**. **One and One is Two** is just one of the first uses of **and** as an associative conjunction that children learn.

Statutes enacted by the Legislature, executive orders by the Governor, and the rules and opinions of the Court all use **and** in only this ordinary sense as an associative conjunction. The Court had occasion to recognize this use of **and** in the case of *Sun Valley Foods Co v Ward*, 460 Mich 230, 237, n 6; 596 NW2d 119 (1999),

---

"[6] Our conclusion is bolstered by several expert opinions offered to support defendant.

Professor Donald Hettinga, an English professor at Calvin College and contributor to the Harbrace College Grammar Handbook, stated:

> The conjunction *and* joins two separate clauses that set forth distinct conditions. The parallelism of that construction makes one expect that if there were a time constraint the phrase defining it would appear

> immediately after *is filed*, in other words, in an analogous position to the phrase *before the expiration of the (10-day) period*. However, as it stands that particular phrase has no grammatical authority over the stuff of the second clause--the matter of the bond.

Professor Joan Karner Bush, an English professor from the University of Michigan stated:

> [T]he adverbial phrase 'before the expiration of the (10-day) period' modifies the verb is taken. . . . You asked what the adverbial propositional clause 'before the expiration' modified: 'is taken' or 'is filed.' I believe the adverbial phrase modifies the verb 'is taken.' My decision is based on the assumption that in clear writing modifiers are placed as close to the word they modify as possible and the 'before the expiration' is closest to 'is taken.'"

And is not a technical word and has no special meaning in law. There is no entry for **and** in *Black's Law Dictionary* (8th Ed) (West 2004). **And** is quite unlike **fee** which has a common meaning — a payment for some professional advice or service — and a unique meaning in property law — an interest in real estate such as fee simple. *The Oxford American College Dictionary* 492.

This common use of **and** as an associative conjunction applies when understanding the first sentence of MCL 418.845 which states that, "The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state." Indeed, it is imperative that the common use of **and** apply to understand this statute because MCL 8.3a states that,

> "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

This statute which directs the understanding of all statutes must be applied as the Court observed when deciding *People v Harrison*, 194 Mich 363, 367-368; 160 NW 623 (1916),

> "The general rule is thus concisely stated in 36 Cyc. p. 1105:
>
> 'It is competent for the legislature to enact rules for the construction of statutes, present or future, and, when it has done so, each succeeding legislature, unless a contrary intention is plainly manifested, is supposed to employ words and frame enactments with reference to such rules. * * * Such acts of legislative construction are not binding upon the courts as to transactions occurring before their passage, but as to matters occurring thereafter such legislation guides all departments of government, even though plainly contradictory to the act construed.'"

There is no occasion for the Court to consider some other meaning for **and** in the first sentence of section 845 as there is no uncertainty about its use as an associative conjunction. The confusion about the meaning of **and** that the Court has sometimes expressed — *Heckathorn v Heckathorn*, 284 Mich 677, 681; 280 NW 79 (1938)[1] — ends when understanding the contexts in which **and** can be used in statutes. The principles of logic that are commonly known as DeMorgan's Rules inform the meaning of **and** when it is used in the context of negation. DeMorgan's Rules can be expressed as

not (x and y) means not (x) or not (y)

while

not (x or y) means not (x) and not (y)

---

[1] "'The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.'"

The distribution of the negative through a phrase in a sentence commonly occurs in statutes which involve the prohibition of conduct such as **Thou shall not rape and murder**. A reader would intuitively apply DeMorgan's Rules to distribute the prohibition conveyed by the word **not** to mean **Thou shall not rape *or* murder**. Only a confused reader would believe that the prohibition applied only to the rapist who also kills.

This operation of DeMorgan's Rules cannot apply to inform the meaning of **and** in the first sentence of section 845 because there is no negative that could be distributed.

Another principle of logic applies to inform **and** when used in the context of description that can be expressed as

subject (x) has the properties of adjective (a) and adjective (b)

while

subject (x) has the properties of adjective (a) or adjective (b)

When (a) and (b) convey the same or a closely related idea, the word **and** can be read as the alternative conjunction **or**. An example of this is found in MCL 418.305, which states that, "If the employee is injured by reason of his **intentional and wilful** misconduct, he shall not receive compensation under the provisions of this act." (emphasis supplied) **Intentional** and **wilful** are adverbs which are used to describe the subject **misconduct** to convey the same idea so that **and** in section 305 could well be read as **or** without changing the meaning of the sentence. Other examples abound because lawyers commonly use two adjectives or two subject complements having the same or very close meaning to describe something in a statute such as **Aid and abet**, in a contract such as **Due and payable**, and in a will such as **Give and bequeath**. This usage which is commonly known as a doublet does not render **and** uncertain.

There is no doublet in the first sentence of section 845.

However, when (a) and (b) convey different ideas, **and** cannot be understood as the alternative conjunction **or**. An example of this is found in the first sentence of MCL 418.301(9) which states that, "'Reasonable employment' as used in this section, means work that is **within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety**, and that is **within a reasonable distance from that employee's residence**." The antecedent subject complement **within the employee's capacity to perform** conveys a completely different idea from the subsequent subject complement **within a reasonable distance from that employee's residence** so that **and** can only be an associative conjunction. **And** cannot be read as an alternative conjunction without confusing the meaning conveyed by the first sentence of section 301(9).

The first sentence of section 845 is only another example of this grammar. The noun phrase **a resident of this state** in the antecedent subject complement **a resident of this state at the time of injury** is completely different from the noun phrase **contract of hire** in the subsequent subject complement **the contract of hire was made in this state. Resident** refers to a person through the idea of the place of living. **Contract of hire** is no person. **Contract of hire** is a particular kind of an agreement between two people.

The Court has recognized that **and** is used as an associative conjunction in the first sentence of section 845. Justice RILEY reported the accord on the Court about the understanding of the use of **and** in the case of *Boyd v W G Wade Shows*, 443 Mich 515, 528, 535; 505 NW2d 544 (1993) (RILEY, J., dissenting) by stating that,

> "The statute defining the limit of the jurisdiction of the bureau is clear and unambiguous: jurisdiction over controversies arising out of injuries suffered outside Michigan exists where (1) 'the injured employee is a resident of this state at the time of injury *and* [(2)] the contract of hire was made in this state.' MCL 418.845; MSA 17.237(845).
>
> * * *
>
> The majority does not dispute that the language of the extraterritorial provision is clear . . ." (emphasis by the Justice)

The Court expressed no uncertainty in understanding **and** — or any other text — when considering the first sentence of section 845 in the case of *Roberts v IXL Glass Corp*, 259 Mich 644; 244 NW 188 (1932) or afterwards. And the Court of Appeals mentioned none when considering the statute in the case of *Austin v W Biddle Walker Co*, 11 Mich App 311; 161 NW2d 150 (1968), *Wolf v Ethyl Corp*, 124 Mich App 368; 335 NW2d 42 (1983), and *Hall v Chrysler Corp*, 172 Mich App 670; 432 NW2d 398 (1988).

As **and** *is* an associative conjunction in the first sentence of section 845, the antecedent subject complement **a resident of this state at the time of the injury** and the subsequent subject complement **the contract of hire was made in this state** must be considered as joint requirements and each established for the Board to have jurisdiction to hear a claim for compensation when an employee was injured outside of Michigan.

And is no synonym for **or**. **Or** is an alternative conjunction that connects the words, clauses, and sentences that should be understood severally, not jointly. *The Oxford American Dictionary* 958-959. *Webster's New Collegiate Dictionary* 806.

The Court recognized this sharp difference between **and** as an associative conjunction, which directs understanding of words, clauses, and sentences together, from **or** as an alternative conjunction, which directs understanding words, clauses, and sentences severally, in the case of *Thayer v Lumber Co of City of Muskegon*, 157 Mich 424, 432; 122 NW 199 (1909) by stating that, "The use of the disjunctive 'or' shows that there are two distinct classes of cases . . ." Justice KELLY echoed this by stating in the case of *People v Monaco*, 474 Mich 48, 62; - NW2d - (2006) (KELLY, J., concurring in part and dissenting in part) that, "'And' is conjunctive. 'Or' is disjunctive. They do not mean the same thing." And the majority fully embraced this view. The majority only denied applying **and** and **or** in any other way to decide the case by stating that, "our reading of the statute does not ignore the word 'or' or replace the word 'or' with the word 'and' but merely follows the context of the

sentence . . . The dissent would ignore the context and hold that the statute can be violated by meeting just one of the two conditions." *Monaco, supra*, 57, n 5.

The antecedent subject complement **a resident of this state at the time of injury** could be disregarded in favor of the subsequent subject complement **the contract of hire was made in this state** in any given case only had the alternative conjunction **or** been used. However, that alternative conjunction was not used and the Court cannot redact the first sentence of section 845 to effect such a change having said in the case of *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002) that, "As we have indicated with great frequency, our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification." See also, *People v Gatski*, 472 Mich 887, 888; 694 NW2d 57 (2005) (TAYLOR, C.J., dissenting),

> "Given that the statute makes sense when 'or' is read in the disjunctive, the Court of Appeals had no ground to read 'or' as if it said 'and.' In reviewing a statute, if its language is clear, we must conclude that the Legislature intended the meaning expressed, and the statute is enforced as written. [citation omitted]"

And in *MacDonald v PanAm World Airways, Inc*, 859 F2d 742, 746 (9th Cir 1988) (KOZINSKI, J., dissenting), it was recognized that, "We give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read 'or' for 'and.'"

And cannot be expunged from the first sentence of section 845 for two reasons. First, the Court may expunge the text of a statute only to resolve a conflict with the United States Constitution, *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803), or the Michigan Constitution of 1963, *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), which is not presented by the use of **and** in the first sentence of section 845. There is no suggestion that the use of **and** as an associative conjunction creates some conflict with the United States Constitution or the Michigan Constitution of 1963.

The other reason that **and** cannot be expunged from the statute is that it would render the sentence ungrammatical or require expunging either the antecedent subject complement or the subsequent subject complement to maintain the grammar of the sentence without **and**, which the Court may not do. *Lesner, supra,* 101.

The Court cannot elide **and** or the antecedent subject complement **a resident of this state at the time of injury** or the subsequent subject complement **the contract of hire was made in this state** because of some difficulty in applying the first sentence of section 845 or that a better, more humane result could be obtained. The difficulty encountered by people, their lawyers, and courts when implementing a statute does not inform its meaning and is no license for the Court to supplement or expunge the actual text provided by the Legislature as the Court said in the case of *Lesner, supra,* 105, that,

> ". . . the difficulty of an administrative tribunal in making a factual determination called for by a statute is not a justification for ignoring the statute. The reason is that the Legislature, the policy-making arm of our government, in taking up this matter, is held to have considered this issue and settled on this approach. It is not within our authority to disregard that choice."

and in *Mayor of the City of Lansing v Pub Service Comm,* 470 Mich 154, 161, 165-166; 680 NW2d 840 (2004) that,

> "We are aware . . . this reading of the statute may facilitate frivolous and potentially crippling resistance from local governments along the route of a utility project. Such an argument, however, misunderstands the role of the courts. Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.
>
> * * *
>
> Especially in the context of the types of cases and controversies considered by this Court—those in which the parties have been the most determined and persistent, the most persuaded by the

> merits of their own respective arguments—it is extraordinarily difficult to conclude that reasonable minds cannot differ on the correct outcome. That is not, and has never been, the standard either for resolving cases or for ascertaining the existence of an ambiguity in the law. The law is not ambiguous whenever a dissenting (and presumably reasonable) justice would interpret such law in a manner contrary to a majority. Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have concluded that the law is 'ambiguous,' and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous. Rather, a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, *id.* at 467, or when it is *equally* susceptible to more than a single meaning. In lieu of the traditional approach to discerning 'ambiguity'—one in which only a few provisions are truly ambiguous and in which a diligent application of the rules of interpretation will normally yield a 'better,' albeit perhaps imperfect, interpretation of the law—the dissent would create a judicial regime in which courts would be quick to declare ambiguity and quick be quick to declare ambiguity and quick therefore to resolve cases and controversies on the basis of something other than the words of the law." (emphasis by the Court)

Similarly, the Court may not strike **and** and either of the subject complements because it is a statute in the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq., that might be "liberally" construed to effect a remedial or humanitarian purpose. The first sentence of section 845 describes the jurisdiction of the Board, a most particular purpose, and one that may not be subordinated to the general goals of the WDCA as the Court ruled in the case of *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 233-234, 233, n 12; 666 NW2d 199 (2003),

> "The dissents justify their unusual conclusions with little more than invocation of the doctrine that WDCA matters are to be construed liberally because the statute is remedial in nature. Whatever the efficacy of this rule of construction, its application is logically justifiable only where the employer's responsibility is established: where the employee proves the injury is work-related.[12] We believe it is inappropriate to utilize the 'liberal construction' standard when the issue being considered is the *initial* qualifying matter whether the claimed injury falls within the WDCA regime. That decision, nearly jurisdictional in nature, is not to be tilted for or against either party as it is made solely for the purpose of determining whether the worker's compensation system will entertain the claim.

> Accordingly, we conclude that this approach to interpretation of the statute is inapplicable . . ."
>
> * * *

---

[12] Once an employee has established the existence of an injury that arises out of and in the course of employment, the 'liberal construction' standard could arguably be applicable in determining, for example, the extent of the employee's injuries or his ability to return to work after rehabilitation. Yet we note that the Legislature has instructed that the 'liberal construction' standard be utilized on only one occasion in the *entire* WDCA. See MCL 418.354(17). Further, conventional rules of statutory construction are employed to resolve ambiguities, not negate the import of the clear statutory requirements. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003). The dissents identify no ambiguity at issue in this case. In any event, we do not address this question, as it is not before us in this case."

(emphasis by the Court)

Certainly, striking **and** and either of the subject complements from the first sentence of section 845 would enlarge the jurisdiction of the Board in direct contravention of the well-established principle that the jurisdiction of a tribunal is only that which has been authorized by the authority creating the tribunal, authority that cannot be enlarged or contracted. *Reed v Yackell*, 473 Mich 520, 546-548; 703 NW2d 58 (2005) (CORRIGAN, J., dissenting).

And and either of the subject complements **a resident of this state at the time of injury** and **the contract of hire was made in this state** cannot be expunged from the first sentence to avoid a conflict with another statute in the WDCA. The rule for reconciling two statutes that appear to conflict is based on the relative specificity of each, not where placed or when enacted as the Court held in the case of *Crane v Reeder*, 22 Mich 322, 324 (1881) that,

> "That where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended

> to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature are not to be presumed to have intended a conflict."[2]

The text of a statute which actually conflicts with another cannot be expunged to reconcile or avoid the conflict as the Court said in the case of *Keho v Bd of Auditors of Bay Co*, 235 Mich 163, 166-167; 209 NW 163 (1926) that,

> ". . . this statute expressly provides for vaccination of persons without cost to themselves whenever the board of health so directs but at the expense of the city, village or township, as the case may be. It not only provides for free vaccination to the individual but it also fixes the paymaster of the one performing the service. The services performed by plaintiffs, at least those involved in the present case, were the services provided for in this act which deals with this specific subject. Therefore, we may not look to general language found in a general statute dealing with communicable disease to fix a liability for services expressly provided for in this act. It may be true as a general proposition that the legislative policy of the State has been to place the burden of epidemics of communicable diseases on the county. But it was within the power of the legislature itself to deviate from that policy and we may not overlook legislation which it has enacted on a subject with which it had power to deal even though it does not follow a general policy."

The first sentence of section 845 is more specific than the other statute in the WDCA which describes the jurisdiction of the Board by stating that, "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrates, as applicable." MCL 418.847(1), first sentence. Certainly, the first sentence of section 845 addresses the specific subject of a claim based on an injury received by an employee outside of Michigan, not just "any question."

The first sentence of section 845 is more particular than any statute in the WDCA describing the eligibility of an employee for compensation such as the first sentence

---

[2] *Dewey v Cent Car & Mfg Co*, 42 Mich 399, 402; 4 NW 179 (1880). *In the Matter of Landaal*, 273 Mich 248, 252-253; 262 NW 897 (1935). *Mayor of Port Huron v City Treasurer of Port Huron*, 328 Mich 99, 104; 43 NW2d 77 (1950). *Malcolm v City of East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991).

of MCL 418.301(1), which states that, "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." Again, the first sentence of section 845 addresses the place where an employee received an injury — **injuries suffered outside this state** — that is not involved in the first sentence of section 301(1).

And were there some conflict with another statute in the WDCA, **and** could be given effect as an associative conjunction and with that, the antecedent subject complement **a resident of this state at the time of injury** and the subsequent subject complement **the contract of hire was made in this state** as an exception. *Crane, supra.*

The Court forgot this principle that a specific statute still applies as an exception to any general statute with which it might conflict when deciding the case of *Roberts, supra.* The disregard resulted in expunging **and** and the antecedent subject complement **a resident of this state at the time of injury** from the first sentence of section 845. The Court said in the case of *Roberts, supra,* 647, 648-649, that,

> "It is quite significant that this recital as to the employee being a resident at the time of injury was embodied by the amendment in the procedural part (part 3) of the act only; but was not inserted in the part of the act (part 1) which defines and fixes the rights and liabilities of employers and employees. In construing this act this fact was somewhat stressed in *Crane* v. *Leonard, Crossette & Riley,* 214 Mich. 218, 230 (18 A. L. R. 285, 20 N. C. C. A. 621). Further, the quoted portion of section 6 seems conclusive of the fact that the original enactment was intended to cover 'all employees' regardless of residence or the *locus* of the accident.
>
> * * *
>
> If the 1921 amendment were to be construed in accordance with appellants' contention it would work a radical change in the scope and effect of the act. We cannot conceive of the legislature intending or attempting to accomplish such a result inferentially, as it were, by including the single quoted phrase in section 19 of part 3. If the legislature intended to so amend the statute, clearly it required a change in section 6 of part 1, above quoted, which is in no way referred to or changed by the amendatory act. That the legislature did not intend by the 1921 amendment to modify the act in the manner appellants assert is

> almost conclusively disclosed by the fact that the amendatory act covers section 7 of part 1; and as above stated again re-enacted that portion which defines as an employee 'every person in the service of another under any contract of hire.' This re-enacted portion of section 7 is in full harmony with the original provision in section 6 that the employer's election to come under the act is an election 'to cover and protect *all employees* employed in any and all * * * business' of the employer. While it must be conceded that there is some conflict between the various quoted provisions of the act as amended, we are satisfied that the reasonable construction and the one necessary to carry out the legislative intent appearing from the whole act is that it covers nonresident as well as resident employees in those cases wherein the contract of employment is entered into in this State with a resident employer."

This mistake was compounded in two ways. First, the Court invoked the "liberal" construction from the general purpose of the WDCA to decide the jurisdiction of the Board by stating in *Roberts, supra*, 649,

> ". . . we think it proper to add that in holding the workmen's compensation act applicable to employees contracting in Michigan with resident employers, notwithstanding the employee is a nonresident at the time of the accident, we sustain a construction which is in accord with the humane purposes of the act and also is in accord with the construction of optional compensation acts in several other jurisdictions . . ."

Again, the general purpose of the WDCA does not warrant a "liberal" construction of the first sentence of section 845 which describes the authority of the Board to hear a claim. *Rakestraw, supra*. Moreover, whatever a "liberal" construction might mean, it does not include an actual disassembly through expunging extant text in a statute.

The other way in which the mistake was compounded was striking actual text to avoid certain outcomes as the Court said in deciding *Roberts, supra*, 652, 653, that,

> ". . . appellants' theory as to nonresidence being controlling is accepted, a nonresident employee who entered into a contract for employment in this State would not be protected by the compensation act even in cases wherein the injury occurred in this State.
>
> * * *

> It would also seem to lead to this anomalous situation: Without the consent or knowledge of the employer one employed in this State by changing his residence from without the State to one within the State would automatically place himself within the act, or if during his employment should become a nonresident he would not thereafter be bound by the act, and could maintain a common-law action against his employer notwithstanding the employer had elected to come under the act."

An appreciation of the first sentence of section 845 as a specific exception would have alleviated these professed anxieties. The Board always has jurisdiction to hear a claim for compensation founded on an injury received in Michigan. The first sentence of section 845 does not contradict this in any way by applying only **injuries suffered *outside* this state**. (emphasis supplied) Changing the sentence as the Court did in the case of *Roberts, supra,* did not affect the statutes giving the Board jurisdiction over a claim based on an injury in Michigan.

The situation that was thought to be so "anomalous" by the Court in *Roberts, supra,* is not. An employer does not need to know where an employee lives because no employer can require an employee to maintain citizenship in or outside of Michigan as a condition of employment.

And the Court was quite wrong about the availability of a lawsuit by an injured employee if a claim for compensation is not available. The statute that provides an employer with immunity from a lawsuit by an injured employee is not contingent on the availability of compensation. The first sentence of MCL 418.131(1) states that, "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." Plainly, an employee cannot sue an employer because a claim for compensation is not available having been barred by time, MCL 418.381(1), barred by a filing defect, MCL 418.222(1) - (6), barred by misconduct of the employee causing the injury, section 305, or by lack of jurisdiction. The only exception from immunity is for an **intentional tort** and not for where the injury occurred as the second

sentence of section 131(1) states that, "The only exception to this exclusive remedy is an intentional tort."

Ultimately, the consideration of the outcomes and the description of potential results as "absurd" and "anomalous" are quite beside the point of what the sentence actually says and what that means as the Court said in the case of *People v McIntyre*, 461 Mich 147, 155-156, n 2, 159; 599 NW2d 102 (1999) that,

---

"[2] Reference is made here to the infamous case, *Church of the Holy Trinity v United States*, 143 US 457; 12 S Ct 511; 36 L Ed 226 (1892) that is sometimes recognized as a foundational stone of the 'absurd result' rule of statutory construction. See *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976).

In *Holy Trinity*, the United States Supreme Court was required to determine whether the Holy Trinity Church, which contracted with a resident of England to be its pastor, had therefore violated a federal statute making it unlawful (and punishable by a fine) for any person to 'in any way assist or encourage the importation or migration of any alien . . . into the United States . . . to perform labor or service of any kind in the United States . . . .' ' *Id.* at 458. Although the Court conceded that the act of the church was nonetheless concluded: 'we cannot think Congress intended to denounce with penalties a transaction like that in the present case.' *Id.* at 458-459. The Court explained: 'It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Id.* at 459.

In Michigan, this same so-called rule of statutory construction has been stated as follows: '[D]eparture from the literal construction of a statute is justified when such construction would produce an *absurd and unjust result* and would be clearly inconsistent with the purposes and policies of the act in question.' *Salas*, n 2, *supra* at 109 (emphasis added).

[We] agree with Justice Scalia's description of such attempts to divine unexpressed and nontextual legislative intent as 'nothing but an invitation to judicial lawmaking.' Scalia, A Matter of Interpretation: Federal Courts and the Law (New Jersey: Princeton University Press, 1997), p 21. This nontextual approach to statutory construction has unfortunately led [the Court of Appeals majority] away from the task of determining the *Legislature's* expressed intent."

---

* * *

> ' '[I]t is not required that we should be sure as to the precise reasons for [a particular statutory] judgment or that we should certainly know them or be convinced of the wisdom of the legislation.' ' *Cady, supra* at 509 (citation omitted); see also *Melia v Employment Security Comm*, 346 Mich 544, 561; 78 NW2d 273 (1956). To paraphrase the apt observation Justice RILEY made in another context, in our democracy, a legislature is free to make inefficacious or even unwise policy choices. P The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people and the tools of democracy: the 'ballot box, initiative, referendum, or constitutional amendment.' *Dedes v Asch*, 446 Mich 99, 123-124; 521 NW2d 488 (1994) (RILEY, J., dissenting)." (emphasis by the Court)

The ruling by the Court in the case of *Roberts, supra,* was perpetuated by rote application in the later cases of *Wearner v West Michigan Conference of Seventh Day Adventists*, 260 Mich 540; 245 NW 802 (1932), *Leininger v Jacobs*, 270 Mich 1; 257 NW 764 (1934). In these cases, the Court peremptorily dismissed the first sentence of section 845 and any argument about the accuracy of the ruling in the case of *Roberts, supra.* For example, the Court said in the case of *Wearner, supra,* 542, that,

> "On the evening of December 7, 1931, while in pursuit of his regular duties, he left his home [in South Bend, Indiana] to attend an evening meeting at the home of one of his parishioners in South Bend, Ind. Almost immediately after alighting from a street car on his way to the meeting, and while between the street car and curb, he was struck by an automobile. He was severely injured and died as a result.
>
> Even were there any merit to appellant's claim that the services of Rev. Mr. Wearner were to be rendered wholly outside of the State, and that he was no longer a resident of Michigan, the question would be governed by the recent case of *Roberts* v. *I. X. L. Glass Corp.*, 259 Mich. 644."

In the case of *Leininger, supra,* 3, the Court said,

> "The employer had elected to come under the Michigan compensation act (2 Comp. Laws 1929, § 8407 *et seq.*), and hence the employee and his dependents were within the provisions of the act. The employer was not relieved from liability by reason of the fact that the employee and his

dependents were not domiciled in Michigan. *Roberts* v. *I. X. L. Glass Corp.*, 259 Mich. 644."

The dispatch of the Court was curious for attending to the text of the statute would have established that Leininger could proceed with the claim for compensation having been injured *in* Michigan as the Court reported in *Leininger, supra*, 2, that,

> "Leininger was employed by defendant Jacobs who was engaged in trucking petroleum products from Toledo, Ohio, to various points in Michigan. Jacobs maintained his principal place of business in Lansing, Michigan. While connecting a trailer to a truck in the regular course of his employment **in** Michigan, Leininger sustained injuries which resulted in his death." (emphasis supplied)

It is problematic why the Court would cite *Roberts, supra*, as any authority to resolve the case of *Leininger, supra*, when the first sentence of section 845 could not apply to allow or to prohibit jurisdiction to hear that claim as it only concerns **controversies arising out of injuries suffered *outside* this state**. (emphasis supplied) A simple citation to the general rule of **all questions concerning compensation** in the first sentence of section 847(1) would have properly resolved the case of *Leininger, supra*, with perhaps a reference that the exception described by the first sentence of section 845 could not apply because Leininger had been injured in Michigan.

After *Leininger, supra*, the Court decided cases that were based on an injury received by an employee who had been working outside of Michigan by understanding **and** in the first sentence of section 845 as an associative conjunction. In the case of *Cline v Byrne Doors, Inc*, 324 Mich 540, 553, 554; 37 NW2d 630 (1949), the Court established that the Board had jurisdiction because Cline was both a resident of Michigan when hurt **and** had been hired in Michigan just as the use of **and** as an associative conjunction would direct by stating that, "In the instant case the workmen's compensation commission found that plaintiff was a Michigan resident working for a Michigan employer under a contract of hire made in this state. * * * The order of the commission reversing the order of the deputy denying compensation is reversed . . ."

In the case of *Daniels v Trailer Transport Co*, 327 Mich 525; 42 NW2d 828 (1950), the Court established that the Board did not have jurisdiction as neither of the requirements of the statute were established. The Court observed in the case of *Daniels, supra*, 530, that,

> ". . . plaintiff is a resident of Illinois, the contract of hire was made in Texas and the injury suffered was in Tennessee.
>
> In our opinion the legislature has established the boundary, and limits the jurisdiction of the commission for out-of-State injuries. The facts in the case at bar do not bring plaintiff within the provisions of the act, hence, the compensation commission exceeded its jurisdiction in making the award."

The Court then revived *Roberts, supra*, in the case of *Boyd, supra*, 520, 524-525, by first distinguishing the circumstances from those in the case of *Cline, supra*, and *Daniels, supra*, and then pronouncing that rule was "fair;" overruling was a poorer option than affirming; and, after all, the Legislature had acquiesced in any mistake,

> "The omission of *Roberts* from the analyses of those cases is fathomable; *Cline* and *Daniels* are distinguishable from *Roberts* in that they involved claims for additional benefits under the act after the employee first obtained compensation from the state where the injury occurred.
>
> * * *
>
> *Roberts* remains an effective means of retaining a fair and consistent scheme for extraterritorial jurisdiction. This Court has stated that a court will not overrule a decision deliberately made unless the Court is convinced not merely that the case was wrongly decided, but also that less injury would result from overruling than from following it. *Dolby v State Hwy Comm'r*, 283 Mich 609; 278 NW 694 (1938). Clearly, because of the gap in coverage that would result, overruling *Roberts* would cause a far greater injury than allowing *Roberts* to stand.
>
> The dissent's assertion that *Roberts* was wrongly decided and contrary to the plain meaning of the statute does not change the fact that the Legislature has acquiesced in extraterritorial jurisdiction as expressed in *Roberts* for over sixty years."

These reasons proffered by the Court in the case of *Boyd, supra*, to revive and to sustain the ruling in the case of *Roberts, supra*, were disingenuous. The difference in the

result in the cases of *Cline, supra,* and *Daniels, supra,* and the result in *Roberts, supra,* was in establishing the two conditions of the first sentence of section 845 as required when understanding that **and** is an associative conjunction. The recovery of compensation by the employee by the laws of the state where injured was not so much as hinted at by the Court in *Roberts, supra, Cline, supra,* or *Daniels, supra.* Certainly, it is not a condition of section 845.

That the first sentence of section 845 was "restrictive" and *Roberts, supra,* "fair" is only a recognition that **and** is an associative conjunction for two conditions is indeed more restricting that just one. It does not explain how the common meaning of **and** as an associative conjunction may be denied and the subject complement **a resident of this state at the time of injury** expunged from that statute.

The description of section 845 as **unduly** restrictive and the ruling in the case of *Roberts, supra,* was founded on an assumption of the authority to assay the statute as "too" narrow or "too" broad and as "fair" or "unjust" in some application. Nowhere in the case of *Boyd, supra,* did the Court refer to any authority allowing a comparison of the rule expressed by the Legislature in a statute with the rule expressed by the Court in a case. There is no authority to allow a comparison and choosing the rule expressed by the Court. *Mayor of the City of Lansing, supra,* 161, 166.

The reason for choosing to retain *Roberts, supra,* was a "gap in coverage" was thought to result from implementing section 845 as written. What this "gap in coverage" was was not explained. And some exposition was required as there *is* coverage for an employee who receives an injury while living and working outside of Michigan. An employer remains liable for compensation by the terms of the laws of the state where the injury occurred regardless of the WDCA.

Finally, the inaction of the Legislature was no ground to retain *Roberts, supra,* as the canon of legislative acquiescence is invalid for subverting the separation of powers

between the Court and Legislature. *Van Dorpel v Haven-Busch Co*, 350 Mich 135, 147; 85 NW2d 97 (1957) (VOELKER, J., for affirmance). *People v Hawkins*, 468 Mich 488, 507; 668 NW2d 602 (2003). Justice VOELKER said in the case of *Van Dorpel, supra*, 147, that,

> ". . . the doctrine [of legislative acquiescence] constitutes a surrender of the judicial function to a legislative body. In the final analysis the objection may fairly be stated thus: Our Court interprets a statute; whether right or wrong our decision henceforth becomes judicially immutable and we are powerless to change it; there is only 1 way it can be changed; if we are wrong we must wait for the legislature to tell us so; if by its long silence and inaction the legislature does not speak out and tell us we are wrong then it has perforce by the same token told us we are right; in any case this Court is forever fettered and powerless to reinterpret the statute in question. We have instead delegated that function to the legislature. This curious doctrine can be boiled down even more: right or wrong in the *Curtis Case*, we are helpless to change it.
>
> Such a doctrine is to squarely place the legislature in the position of a super supreme court."

In the case of *Hawkins, supra*, 507, the Court said that,

> "As we have repeatedly stated, the 'legislative acquiescence' principle of statutory construction has been squarely rejected by this Court because it reflects a critical misapprehension of the legislative process. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 760 n 15; 641 NW2d 567 (2002); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 177-178 n 33; 615 NW2d 702 (2000). Rather, 'Michigan courts [must] determine the Legislature's intent from its *words*, not from its silence.' *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999)." (emphasis by the Court)

Boyd, supra, itself cannot be sustained because of inaction by the Legislature after *its* announcement for the same reason.

The ruling by the Court in the case of *Roberts, supra*, and *Boyd, supra*, cannot be retained by the idea of stare decisis. Stare decisis requires the recognition and mechanical obedience by those departments of government that are charged with the responsibility of executing law such as the Court of Appeals and every trial court in the judicial branch and to the Governor and all agencies of the executive branch, although all remain quite free to express what is thought about the accuracy of the opinion by the Court.

Tebo v Havlik, 418 Mich 350, 362-363, 363, n 2; 343 NW2d 181 (1984) (BRICKLEY, J., lead opinion), reh den 419 Mich 1201 (1984). *Tebo, supra*, 379 (LEVIN, J., dissenting). *In re the Matter of Hague*, 412 Mich 532, 545; 315 NW2d 524 (1982). The Court of Appeals and trial courts and administrative agencies fully appreciate that stare decisis commands judicial action but not thought. The Court of Appeals appreciated this in stating in the case of *Edwards v Clinton Valley Center*, 138 Mich App 312, 314; 360 NW2d 606 (1984),

> "As a member of the Court of Appeals, I am obligated to follow the decisions of our higher court. For that reason, and that reason alone, the order of summary judgment is affirmed.
>
> I feel compelled, however, to register my fundamental disagreement with the result adopted by the *Perry* majority."

Stare decisis is why the ruling in the case of *Boyd, supra*, was applied by the Court of Appeals, the Commission, and Board in this case. The Board said that, "The defendants' appeal to principles of logic, compelling as these may be, means nothing because the iron-bound rule of stare decisis controls the result in this case — right or wrong." (12a)

However, stare decisis as a rule of compulsion cannot apply to a department that decides the law. This is why the legislative branch remains entirely free to amend a statute after a decision by the Court. And that new statute made fully retroactive as occurred in MCL 418.354(17). See *Romein v Gen Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990). This is also why the Court remains fully free to review and correct an earlier, mistaken opinion. The Court decides what the law is and is not obliged to simply execute prior rulings as the Court of Appeals, trial courts, and administrative agencies of the executive branch.

No decision by the Court can forever command strict obedience by the Court. And the Court has never actually thought so. While the Court has said that, "stare decisis is a 'principle of policy' rather than 'an inexorable command' . . ." in the case of *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000), there is no jurisprudentially

sound way to explain how the rule *is* an inexorable command for the Court of Appeals and trial courts but only a "policy" for the Court itself. It is peculiar that the rule of stare decisis could allow the Court of Appeals and all of the trial courts the freedom of thought and an unrestrained expression of opinion about a decision by the Court but then somehow prefer that the Court itself not think about its prior opinions. And it is difficult to see how "the actual and perceived integrity of the judicial process" is *promoted* when stare decisis inhibits review and correction of an erroneous decision. No rule can promote the integrity of the judiciary by perpetuating a ruling which was not faithful to the text of a statute. The integrity of the judiciary as part of a regime of law and not people *is* promoted by a full and uninhibited consideration of prior rulings for the fidelity to text. *Reed, supra,* 560 (CORRIGAN, J., dissenting),

> "The doctrine of stare decisis should not prevail over a legislative directive. As I noted in *Robinson v Detroit*, 462 Mich 439, 472-473; 613 NW2d 307 (2000):
>
> > I agree that too rapid change in the law threatens judicial legitimacy, as it threatens the stability of any institution. But the act of correcting past rulings that usurp power properly belonging to the legislative branch does not threaten legitimacy. Rather, it restores legitimacy. Simply put, our duty to act within our constitutional grant of authority is paramount. If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power. [CORRIGAN, J., concurring.]"

The rule of stare decisis is antithetical to the function of the Court. The function of the Court is to say what the law is. The function of the Court is not to say what that ought to be much less contradict the law. This antedates any decision about stare decisis having first emerged during the impeachment of United States Supreme Court Justice Samuel CHASE in 1804. The House managers had sought conviction because Justice CHASE had disallowed arguments about the law on the grounds that the law could be settled and

had been settled. The House managers said that an argument about the meaning of the law could never be closed off from further judicial investigation for an opinion might be clear but not what the constitution or statute said. Harkening to the ruling in *Marbury, supra*, just a year before, the House managers said that the genius of a written constitution and written statutes was in the ability to be read and then compared with the opinion of a court to know that the opinion was or was not faithful to that written law. While Justice CHASE was acquitted, the close vote made the point that a court can and, indeed, must hear reargument and the criticism of its precedents. Whittington, *Constitutional Construction, Divided Powers and Constitutional Meaning*, 52-54 (Harvard Univ Press 1999).

Ultimately, the standard for overruling a decision is only the fidelity to the statute.

The Court can and must now overrule *Roberts, supra*, as not faithful to the text **and** in the first sentence of section 845 and *Boyd, supra*, for perpetuating that rule without sound reason.

The Court may consider reliance on *Roberts, supra*, and *Boyd, supra*, after overruling to determine when those cases may still apply.

Usually, a decision by the Court about the meaning of a statute applies to any case that is subject to the statute as the Court has said that, "the general rule is that judicial decisions are to be given complete retroactive effect." *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (2005). However, some cases are excluded and others are excepted from this general rule.

Two kinds of cases are excluded from the general rule. A case that has already been decided is excluded for two reasons. First, a case that has already been decided is not a *pending* case. And second, a case that has already been decided is subject to only the order or judgment that the trial court entered because of the rule of res judicata as Justice

COOLEY said for the Court in the case of *Jacobson v Miller*, 41 Mich 90, 93; 1 NW 1013 (1879),

> "legal controversies are not to be suffered to be tried over and over, to the annoyance of parties, the disturbance of the community, the unnecessary absorption of the time of the court, and at an expense not less to the public than to the litigants.
>
> The general principles which must govern the case are familiar. There are two matters in respect to which an adjudication once made may be conclusive: *first*, the subject matter involved in the litigation; *second*, the point of fact or of law, or of both, which was necessarily adjudicated in determining the issue upon the subject matter in litigation."

Another kind of case excluded from the operation of a decision by the Court is one that is pending a decision by a trial court on remand. While a *pending case*, a trial court must obey the mandate of the court as the law of the case. Tebo, *supra*, 379-380, 379-380, n 17 (LEVIN, J., dissenting). A later decision by the Court which might contradict the mandate can be applied during the appeal that is available after the trial court has fulfilled the mandate. *Tebo, supra*, 380, n 18.

Unlike an exclusion which is mandatory, exceptions to the general rule are ad hoc. The United States Constitution does not require any particular application of a decision by the Court about the meaning of a statute as the United States Supreme Court recognized in the case of *Great Northern R Co v Sunburst Oil & Refining Co*, 287 US 358, 364; 53 S Ct 145; 77 L Ed 360 (1932),

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases, intimating, too broadly * * *, that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." (emphasis by the Court)

The Michigan Constitution also does not direct any specific application of a decision by the Court as the Court observed in the case of *People v Hampton*, 384 Mich 669,

674; 287 NW2d 404 (1971), "this Court is under no constitutional compulsion to apply the *Cole* rule, either prospectively or retroactively." While statutes such as section 8.3a and MCL 750.2 establish *how* the Court should understand statutes, there is no statute which establishes *when* a decision applies. There is no rule or administrative order of the Court describing an exception of a case from a decision about the meaning of a statute.

Ad hoc does not mean that there is no standard for excepting a case from a decision by the Court. Indeed, there are very well established rules. The first concerns the occasion for any exception. The occasion for an exception is a decision by the Court that announces a new rule, which is a decision that overrules clear and established case law. Justice LEVIN recapitulated this rule from the decisions by the United States Supreme Court and the Court by stating that "a decision of this Court is generally retroactive unless it overrules established precedent or otherwise declares a new rule, in which case the Court may limit the retroactivity of the new rule." *Tebo, supra*, 381. Most recently, the Court said in the case of *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW2d 539 (2005), that, "As we reaffirmed recently in [*Wayne Co v*] *Hathcock* [471 Mich 445, 484, n 98; 684 NW2d 765 (2004)], prospective-only applications of our decisions is generally 'limited to decisions which overrule *clear and uncontradicted* case law.'" (emphasis by the Court) Overruling a decision by the Court of Appeals is not an occasion for an exception no matter how clear and uncontradicted it might be. *Tebo, supra*, 380-381, "a subsequent decision by this Court disapproving or overruling a Court of Appeals decision does not constitute a 'declaration of a new rule' or 'overruling of established precedent' . . ."

After this predicate — a decision by the Court overruling established precedent or announcing some brand new law — a second standard applies. This establishes the particular criteria to consider for actually excepting a case. In the case of *People v Auer*, 393 Mich 667, 676-677; 227 NW2d 528 (1975), the Court held that,

> "The test for determining whether a rule is to be applied retrospectively or prospectively is set forth in *People v*

Hampton, 384 Mich 669, 674; 187 NW2d 404 (1971), as follows:

> 'The United States Supreme Court has discussed various factors to be used in determining whether a law should be applied retroactively or prospectively. There are three key factors which the Court has taken into account: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice. See, *e.g.*, *Linkletter v Walker* (1965), 381 US 618 (85 S Ct 1731, 14 L Ed 2d 601); *Tehan v United States ex rel Shott* (1966), 382 US 406 (86 S Ct 459, 15 L Ed 2d 453).'"

The three criteria — purpose of the new rule/reliance/effect on administration of justice — all inform the idea of exigent circumstances, which was expressed by the Court in the case of *Devillers*, *supra*, 586, that, "Prospective application is a departure from this usual rule and is appropriate only in 'exigent circumstances.'"

In the case of *People v Markham*, 397 Mich 530, 535; 245 NW2d 41 (1976), the Court explained how each of these criteria could be considered,

> "Those cases establish a three-pronged test, namely, '(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice'. 384 Mich at 674.
>
> The first factor promotes an inquiry into whether the purposes of the rule can be effectuated by prospective application. When the ascertainment of guilt or innocence is not at stake, prospective application is possible. 384 Mich at 677. *White* and the guarantee against double jeopardy are not required to ascertain guilt or innocence.
>
> 'The second and third factors can be dealt with together because the amount of past reliance will often have a profound effect upon the administration of justice.' *Id.*
>
> When a decision overrules past settled law, more reliance is likely to have been placed in the old rule than in cases where the old law was unsettled or unknown."

And Justice LEVIN added that the preservation of an issue was also part and parcel of the inquiry about reliance by stating in *Markham*, *supra*, 542-543 (LEVIN, J., dissenting),

> "The question whether an accused person waives the benefit of a new decision by failing to raise the issue in the trial court before the new decision is announced poses, in somewhat different form, the question of the retroactivity of that decision.
>
> The consequence of failure to preserve the issue is determined by the extent of the retroactivity. If a decision is fully retroactive, failure to raise the issue in the trial court or pursue it on direct appeal is of no consequence and will not preclude collateral attack on the conviction. If the retroactivity of the decision is limited to (1) cases pending on direct appeal; (2) cases pending on direct appeal where the issue was raised on appeal; or (3) such cases where the issue was preserved in the trial court, failure to preserve the issue at the trial or appellate level is of consequence."

The Court has consistently considered the actual claim and payment of compensation as reliance by employees and employers on an opinion about a statute in the WDCA to limit the application of an overruling opinion. *Pike v City of Wyoming*, 431 Mich 589; 433 NW2d 768 (1988). *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632; 433 NW2d 287 (1988). *Lesner, supra*. In the case of *Pike, supra*, 604, the Court said that,

> "Applying the *Linkletter* test in the instant case, we note that the purpose of the rule we announce today is to accord equal protection to wives and husbands. This purpose would not be advanced by requiring plaintiff to repay dependency benefits already received. The factors of reliance on the old rule and the effect on the administration of justice are considered together. See *Hampton, supra*, at 677; *Kamin, supra*, at 495. Without a doubt, reliance on the conclusive presumption of dependency was very great. In addition to providing an intended benefit for persons such as plaintiff, it is apparent that the conclusive statutory presumption was designed as an administrative convenience. The Legislature sought to dispense altogether with the necessity in particular circumstances of adjudicating a wife's factual dependency on a case-by-case basis. Although that design has been frustrated by our holding that the conclusive presumption is invalid, the administration of justice would not be served by requiring the repayment of benefits. While the requirement of case-by-case determination necessarily imposes an additional burden on the administration of justice, we note that the burden would be heavier if our ruling were to be applied retroactively."

The Court exempted the cases in which benefits had already been paid from the operation of an overruling opinion in the case of *Riley, supra*, 646,

> "Application of the *Linkletter* test, also leads to the conclusion that *Gusler* be applied to awards made after December 30, 1981, and benefits due and not yet paid after December 30, 1981. Under *Linkletter*, we look first to the purpose of the 'new rule' laid down in *Gusler*. It was to correct a serious error in the interpretations of a statute under which employees were being paid benefits in excess of the rate intended by the Legislature. We believe this purpose would be furthered by applying *Gusler* only to payments made after the opinion's date.
>
> Second, we take account of the fact that employees and employers relied for more than eight years on the *Jolliff* holding that minimum as well as maximum rates were adjustable under § 355. *Gusler's* implementing language appropriately recognizes that reliance, and it safeguards employees by not requiring repayment of any portion to benefits received prior to *Gusler*.
>
> Finally, by applying the new rule only to payments after December 30, 1981, *Gusler* was designed to have a minimum effect upon the administration of justice. Cf. *People v Auer*, 393 Mich 667, 677; 227 NW2d 528 (1975), reh den 394 Mich 944 (1975)."

and again in *Lesner, supra*, 109, that,

> "The purpose of the rule adopted in this opinion is to correct what we believe to be the flawed construction of MCL 418.321 in *Weems*. However, *Weems* has been controlling authority for over six and one-half years. Thus, it appears that there has been widespread reliance on the *Weems* formula in calculating worker's compensation benefits for partial dependents of deceased employees. Further, attempting to revisit the benefit levels finally determined or agreed upon during the period that *Weems* was controlling authority could have a detrimental effect on the administration of justice by imposing an enormous burden on the worker's compensation system, not to mention the reliance of the beneficiaries on the benefits previously awarded under *Weems*.
>
> For these reasons, we hold that the present opinion is to be given only limited retroactive effect."

There is no real reliance on an opinion of the Court when there is no claim and there is no payment of compensation as Justice VOELKER observed in the case of *Van Dorpel, supra*, 146-147,

> ". . . we also see little justice or utility in continuing to give stability or sureness to an unfortunate rule of law; nor do we

> understand that employers or their insurance carriers have gained any vested 'rights' in the interpretation of this statute;"

In sum, those cases that have already been adjudicated on the basis of *Roberts, supra*, and *Boyd, supra*, should not be disturbed now upon overruling because people ought to be able to rely on the adjudication of a claim. A claim never filed and never adjudicated cannot be excepted for there cannot be any reliance on an opinion about a statute in general.

The administration of justice is also germane and served by the narrow exception. An exception of claims that have been adjudicated on the basis of *Roberts, supra*, and *Boyd, supra*, are liable to be re-opened with full retroactivity because res judicata will not apply because the first sentence of section 845 concerns the question of subject matter jurisdiction can be raised and decided at any time. It is not a defense that can be stipulated or forfeited by a party to a lawsuit. *Ward v Hunter Machine Co*, 263 Mich 445, 457; 248 NW 864 (1933). *Reed, supra*, 546-547 (CORRIGAN, J., dissenting). The Board, Commission, Court of Appeals, and the Court should not have to search old case files and then vacate all of those orders entered on the basis of *Roberts, supra*, and *Boyd, supra*.

As Karaczewski was not **a resident of this state at the time of injury** as required by the first sentence of section 845 when understanding **and** as the associative conjunction it is, the Court of Appeals must be reversed. This claim is not one previously adjudicated on the jurisdiction allowed by *Roberts, supra*, and *Boyd, supra*, and not excepted from this rule.

RELIEF

Defendants-appellants Farbman Stein & Company and Nationwide Mutual Insurance Company ask the Court to reverse the opinion of the Court of Appeals and dismiss the *Application for mediation or hearing*.

Martin L. Critchell (P26310)
Counsel for defendants-appellants
Farbman Stein & Co
Nationwide Mutual Ins Co
30700 Telegraph Road, Suite 2580
Bingham Farms, Michigan 48025
(248) 593-2450